

Appeal from Original Decree No.475 OF 1999

Against the order dated 10.9.1999 passed by Sri N.K.Sinha, Sub-Judge-Vth, Begusarai, in Title (Partition) Suit No.188 of 1997.

- 1.RAJIV KUMAR AGRAWAL S/O LATE ARVIND KUMAR AGRAWAL.
- 2.Anjah Kumar Agrawal S/O RAJIV KUMAR AGRAWAL UNDER THE GUARDIANSHIP OF HIS FATHER RAJIV KUMAR AGRAWAL.

Both are residents of Mouza Mokimpur (Mungeriganj) Begusarai, Pargana Ballia, P.O.- PS., Sub Registry, Anchal, Sub-division and District-Begusarai.

----Appellants.

Versus

- 1.RABINDRA NARAYAN AGRAWAL S/O BISHUNDEO NARAYAN AGRAWAL.
- 2.JITENDRRA NARAYAN AGRAWAL S/O RABINDRA NARAYAN AGRAWAL.
- 3.ABHA RANI W/O RABINDRA NARAYAN AGRAWAL.
- 4.MEENAKASHI KUMARI D/O RRABINDRA NARAYAN AGRAWAL.

All are residents of Mouza Mokimpur Begusarai (Mungeriganj) Pargana Ballia, P.O., Police Station, Anchal, Sub-Division, Sub- Registry and District-Begusarai-Begusarai.

Defendants 1st party-respondents 1st party.

- 5.SMT. INDIRA RANI D/O LATE BISHUNDEO NARAYAN AGRAWAL AND W/O RAI ABHAY KRISHNA, RESIDENT OF ANAND BAGH, PATNA CITY.

DEFENDANT 2ND PARTY-RESPONDENT 2ND PARTY.

- 6.MT.SOBHA RANI AGRAWAL WIDOW OF LATE ARVIND KUMAR AGRAWAL.

- 7.DR. SANJIV KUMAR S/O LATE ARVIND NARAYAN AGRAWAL. BOTH ARE RESIDENTS OF MOUZA MOKIMPUR(MUNGERIGANJ) BEGUSARAI, PARGANA BALLIA, P.O., P.S., SUB-DIVISION, AND DISTRICT-BEGUSARAI.

- 8.MRIDULA RANI D/O LATE ARVIND NARAYAN AGRAWAL, RESIDENTS OF MOUZA MOKIMPUR(MUNGERIGANJ),BEGUSARAI, PARGANA BAILIA,P.O.,P.S.,ANCHAL,SUB-DIVISION,SUB-REGISTRY AND DISTRICT-BEGUSARAI.

..... DEFENDANTS 3RD PARTY-RESPONDENT 3RD PARTY.

For the appellants: Mr.Dhrub Narayan, Sr.Advocate.

Mr.Mukesh Kumar Sinha,Advocate.

For the respondents No.1: Sri Kamal Nayan Choubey,Sr.Advocate

No.2: Sri Shashi Shekhar Dwivedi,Sr.Advocate.

No.3: Sri Chitranjan Sinha,Sr.Advocate.

In all : Sri Ambuj Nayan chaubey,Advocate.

For the respondent no.7:Mrs.Anita Raghvendra, Advocate.

PRESENT

**THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO**

**Mungeshwar. Sahoo,J.**

This appeal is directed against the order dated 10.9.1999 passed by Sri N.K.Sinha, learned Sub-Judge Vth , Begusarai, in Title ( Partition ) Suit No.188 of 1997 whereby the learned court below rejected the plaint under Order 7 rule 11(D) of the Code of Civil Procedure.

2. According to the plaintiffs' case one Rai Bahadur Kharag Narayan Agrawal was the common ancestor who had two sons, namely, Bishundeo Narayan Agrawal and Krishnadeo Narayan Agrawal. The parties are the decendents of Bishundeo Narayan Agrawal. Bishundeo Narayan Agrawal had two sons, namely, Rabindra Narayan Agrawal who is defendant no.1 and Arvind Narayan Agrawal, father of plaintiff no.1. Bishundeo Narayan Agrawal had a daughter, Indira Rani who is defendant no.5. Defendant No.3 is the wife of defendant no.1 whereas defendant no.6 is the widow of Arvind Narayan Agrawal. The further case is that Arvind Narayan died leaving behind plaintiff no.1 and defendant no.7 and a daughter, Mridula Rani. Rabindra Narayan Agrawal, defendant no.1 has one son, Jitendra Narayan Agrawal who is defendant no.2 and two daughters , Abha Rani and Meenakshi Kumari.

3. According to the plaintiffs' case there had been a complete partition between Bishundeo Narayan Agrawal and Krishnadeo Narayan Agrawal. In the partition the properties allotted to Bishundeo Narayan Agrawal was further partitioned between him and his two sons in Title Suit No.60 of 1966 in the court of Sub-

Judge, Begusarai. In the said partition only the shops and the houses were partitioned and the agricultural lands were kept joint. Some properties acquired by Rabindra Narayan Agrawal and Arbind Narayan Agrawal from their father by gift was also not partitioned in the said suit. Some properties have been acquired in the name of Abha Rani, wife of Rabindra Narayan Agrawal and Shobha Rani, wife of Late Arvind Kumar Agrawal but the said acquisition in their names is collusive and with a view to save from Ceiling, Income Tax and Wealth Tax. Some of the properties were gifted to Rani Devi by late Kharag Narain or Bishundeo Narain Agrawal were returned to joint family in the name of Sanjeev Kumar and Jitendra Narain. The properties purchased in the name of Triyogi Narain was also returned through deed of relinquishment in favour of Kamla Devi who created a collusive sale deed in the names of Abha Rani and Shobha Rani without receiving any consideration. So, those properties are also joint family property. All these properties have been described in Schedule-2 of the plaint.

4. The further case is that Bishundeo Narayan Agrawal created a family welfare trust and the beneficiaries are defendants no.2,4,7 and the plaintiff no.1. This property has been described in Schedule – 3 of the plaint. The properties allotted to Arvind Kumar Agrawal by partition by his father and his brother and also some of the properties standing in the name of Arvind Kumar Agrawal acquired by deed of gift or otherwise have been mentioned in Schedule-4 of the plaint. Some of the properties have been purchased

benami in the name of heirs of late Arvind Kumar Agrawal but these properties are still joint.

5. The further case of the plaintiff is that the plaintiff could know recently about the decree passed in Title Suit No.44 of 1972 which was filed by defendant no.6, Shobha Rani as next friend of the plaintiff and obtained a collusive decree. The said decree was never acted upon.

6. On these questions the plaintiff prays for partition of his share.

7. It appears that the defendant no.6 appeared and filed a contesting written statement. Thereafter an application under Order 7 rule 11(D) read with Order 14 rule 2 (2) of C.P.C. was filed praying therein to decide the issue and reject the plaint. By the impugned order the learned court below after discussing various photo state copies of the documents filed by the contesting defendants came to the conclusion that the claim of the plaintiff is barred by limitation, res judicata and Benami Transaction Act. The learned court below also found that the property which was self acquired property of Bishundeo Narayan Agrawal was not partitioned in Title (Partition) Suit No.60/1966. On these grounds ultimately the learned court below found that the suit is vexatious litigation and, therefore, rejected the plaint as aforesaid.

8. The learned counsel for the appellants submitted that the learned court below had wrongly rejected the plaint after full fledged discussion on the merit of the plaintiffs' claim and after giving

findings on all the issues involved in the suit without giving opportunity to the plaintiff to prove his case. According to the learned counsel the court could not have decided this issue under Order 14 rule 2 C.P.C. but has decided these issues of limitation, res judicata etc. for rejecting the plaint under Order 7 rule 11(D) C.P.C. In other words what could not have been done under Order 14 rule 2 has been done under Order 7 rule 11 (D) C.P.C. The learned counsel further submitted that question of limitation is a mixed question of law and fact and , therefore, it cannot be decided at the threshold for rejecting the plaint. Learned counsel further submitted that section 11 C.P.C. ,i.e., res judicata do not create any bar in entertaining the suit but it create bar for trying any issue and, therefore, question of res judicata cannot be decided at the very initial stage for rejecting the plaint. Lastly the learned counsel submitted that the power to reject the plaint under Order 7 rule 11 (D) is summary power and the Court can reject the plaint when from the very statement made in the plaint it appears that the suit is barred by any law and, therefore, it should be exercised in rarest of rare case and when it is plain and obvious from the statement of plaint itself. The court cannot investigate the correctness or otherwise of the claim made in the plaint of the plaintiff with a view to reject the same. The learned counsel further submitted that the learned court below has referred to and relied upon various documents which are photo copies filed by the defendants and were not part of the plaint on the ground that the genuineness of those documents have not been challenged by the plaintiff. According

to the learned counsel the court below would not have looked into those documents because Order 7 rule 11(D) provides that whether the suit appears from the statement in the plaint to be barred by any law and, therefore, the court could not have relied upon various documents filed by the defendants. On these grounds learned counsel prayed that the impugned order is not sustainable in the eye of law.

9. On the other hand, the learned counsel appearing on behalf of the respondents submitted that the plaintiff did not annex the documents referred by him in the plaint and, therefore, the defendants filed photo copies and in such circumstance the court has every right to look into documents. In support of his contentions the learned counsel relied upon A.I.R. 1983 Rajasthan 3 (Bhagwan Das versus Goshwami Brajesh Kumar Ji and A.I.R.2000 Bombay 34 (SNP Shipping Services Pvt. Ltd. and others. Vrs. World Tanker Carrier Corpn. And another). The learned counsel further submitted that in A.I.R. 1951 Patna 526 (Tejpal Saraogi & others Vrs. Mahadeo Lal & others) and A.I.R. 1991 Patna 53 ( Rameshwar Mistry & another Vrs. Bebulal Mistry.) it has been held that if the transaction standing in the name of stranger or female member then court fee is payable and that the coparcener cannot claim the property standing in the names of female as joint property as Benami Transaction (Prohibition) Act prohibits the same. The learned counsel further submitted that the plaint can be rejected even after framing of issue and in support of his contention he relied upon A.I.R. 1998 S.C. 634 (I.T.C. Ltd. Vrs. Debts Recovery Appellate Tribunal). The learned

counsel further submitted that the appeal being the continuation of suit the appellate court also may decide that there is no cause of action and, therefore, on this ground also the plaint can be rejected under Order 7 rule 11 (A) C.P.C. According to him this present case does not disclose any cause of action.

10. In view of the above rival contentions of the parties the point arises for consideration in this appeal is as to whether in the facts and circumstances of the case the court could have rejected the plaint under Order 7 rule 11(D) C.P.C.

11. This is a simple suit for partition and, therefore, it cannot be said that the plaintiff has got no cause of action. Whether his claim for partition can be allowed or not is a different matter. At the threshold the said question cannot be decided. In the decisions relied upon by the learned counsel for the respondents, i.e. A.I.R. 1983 Rajasthan 3 and A.I.R. 2000 Bombay 34 it has been held that if the documents are appended to the plaint then while deciding as to whether there is cause of action or not the court can look into the documents annexed with the plaint. In the present case at our hand for want of cause of action the plaint has not been rejected. More over, none of the documents were annexed by the plaintiff with the plaint. The learned court below has referred to many sale deeds, gift deeds, Income Tax returns of the plaintiff which were filed by the defendants. From perusal of the impugned order it further appears that the learned court below with regard to the Title Suit No. 44/1972 has given a finding that the decree passed in that suit has not been

challenged in time as such it is time barred and further that the guardian had not acted adverse to the interest of minors. This finding could not have been given without there being any evidence adduced by the parties at this stage. Moreover this question is a mixed question of law and fact. According to the plaintiff the decree was not acted upon.

12. It further appears that the learned court below has also given a finding that the suit is barred by res judicata . In my opinion, res judicata is a rule of evidence and does not bar entertainment of suit and it is not a bar created under any law. On the finding of res judicata which is a mixed question of law and fact the suit can be dismissed after trial but at the very initial stage the plaint cannot be rejected. In A.I.R. 1951 Patna 526 and A.I.R. 1991 Patna 53 plaint was never rejected under Order 7 rule 11 (D) C.P.C. Appeals were filed from the decree, therefore, those decisions do not help the defendants respondents. The learned court below referred to a decision reported in A.I.R. 1977 S.C. 2421 (T. Arivandandam Vrs. T.V. Satyapal and another) and found that the suit is a vexatious litigation. In that case also plaint was not rejected under Order 7 rule 11(D) C.P.C.

13. From perusal of the impugned order it appears that the learned court below has decided the correctness or otherwise of Title (Partition) Suit No.60 of 1966 and he has given a categorical finding that the property of Bishundeo Narayan Agrawal were left on partition although there was no such case pleaded by either of the



parties. Only on the basis of the argument of the defendants he presumed this fact against the plaintiff. From the entire reading of the order it appears that the entire pleading of the plaintiff has been disbelieved without there being any evidence adduced by the parties. In other words, the plaintiff was not given an opportunity to prove his case.

14. It is well settled principle of law that the plaint can be rejected at the threshold only in the rarest of rarest case if from the statement made in the plaint it is apparent that the suit is barred by any law. Rejection of the plaint at the very initial stage entails very serious consequence for the plaintiff and, therefore, this power has to be used in exceptional circumstances when it is clear and obvious that the suit is barred under law and for that the court has to be absolutely sure that the plaint is barred by the law. The court will not travel beyond the plaint in deciding this question. The ordinary rule is that the court ought to permit the plaintiff to go to trials and in exceptional case this rule is not followed as mentioned in Order 7 rule 11 C.P.C. The court cannot prejudge the case of the plaintiff without trial as has been done in this case. This is a summary jurisdiction and, therefore, it ought to be very sparingly exercised and on the very exceptional case when it is barred by any law and if it is allowed to continue it will be abuse of the process of law but for that reason the court cannot investigate the whole issue involved in the suit. In the present case the learned court below has decided all the issues which are involved and would have been decided after trial only.

15. In view of my above discussion and finding I hold that the impugned order is unsustainable in the eye of law.

16. It appears that during pendency of this appeal many interlocutory applications have been filed on behalf of the parties. I.A. No.5876 of 2005 is a compromise petition but not signed by the parties, therefore, it has not been recorded. The other interlocutory applications such as I.A. No.1435/07, I.A.No.7591/08, I.A. No.3254/08 are the applications under section 340 of Cr.P.C. filed by the respondents. In my opinion, these interlocutory applications are not required to be decided on merit at this stage. The other I.A.No.647/08, I.A.No.727/08, I.A. No.2867/06, I.A. No.2946/07, I.A.No.2868/06 and I.A. No.5704/08 are either applications for permission to sell or contempt applications under Order 39 rule 2A C.P.C. Since the appeal itself is heard on merit I feel that it is not necessary to pass separate order on these interlocutory applications. Moreover, for decision of this appeal on merit all those interlocutory applications have got no importance and it is not necessary to decide.

Accordingly, all these interlocutory applications are disposed of.

17. In the result, this appeal is allowed. The impugned order is set aside and the matter is remitted back to the court below. The court below is directed to proceed ahead according to law.

18. It is made clear that whatever observations, if any, made in the impugned order or in this order by this Court regarding merit will not be considered or referred to by the court below hereafter.

**(Mungeshwar Sahoo.)**

**Patna High Court, Patna.  
The 1<sup>st</sup> of April, 2010  
AnilKr.Sinha/ N.A.F.R.**

